Kulasingam s/o Samuel v Rasamah d/o JV Thambipillai

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COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-57-1996
MAHADEV SHANKAR, ABU MANSOR AND ABDUL MALEK AHMAD JJCA
24 OCTOBER 1996

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Evidence *— Documentary evidence — Forgery of document — Addition of signature with ink of different colour — Document allegedly executed together with another document before solicitor — Whether documents itself constitute independent evidence — Whether document if accepted at face value would constitute a declaration of trust*

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In 1973, the appellant husband filed an action against the respondent wife (since deceased) seeking a declaration that she held two houses ('the properties') on trust for him and that the properties be transferred to him. The appellant, a lawyer's clerk, claimed that he had purchased the properties with his own money but had registered them in his wife's name. He produced in evidence a declaration ('P2') that the properties were purchased by himself and that he was entitled to the income from the properties, which was purportedly executed by his wife. The wife denied that she had executed P2 and claimed that it was a forgery. P2 was said to have been executed at the same time with a memorandum of transfer ('P1') relating to the property but both documents were found to have different typewriting prints. The action was dismissed in 1993. On appeal, the (then) Supreme Court directed that the case be retried before another High Court judge. By agreement, no further evidence was called at the second trial, where the judge simply heard arguments based on the same evidence as available in the first trial. The second trial judge found that part of the signature on P2 was added with a different coloured ink. The second trial judge dismissed the claim, finding it more probable than not on the evidence that the wife, with the assistance of her father, had purchased the properties, and that, even if he was wrong, there was sufficient evidence to justify the presumption of advancement. The appellant appealed. The appellant attacked the omission of the second trial judge to deal with the evidence of PW2, another clerk in the same office as the appellant, who gave sworn evidence that he had seen the respondent sign P2. The main issue was whether the signature on P2 was that of the respondent.

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Held, dismissing the appeal:

(1) Since the respondent claimed that P2 was a forgery, everything turned on the onus of proof. The appellant had to show on the balance of probabilities that the signature was that of the respondent. The respondent had to show beyond all reasonable doubt that the appellant was guilty of forgery (see p 295G).

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(2) The only independent evidence available to the second trial judge and this court was the documentary evidence. PW2 and the appellant were both clerks in the same office and PW2 could not be said to be a totally independent witness. Considering the evidence, not only was the ink different in colour even though both documents were executed on the same day but the typewriting was also not the same. Expert witnesses might give opinion evidence but the court was free to draw its own conclusions. Even if P2 was accepted at face value, it did not constitute a declaration of trust that the properties were to belong beneficially to the appellant. He was only to have the use of the income from the properties and nothing else. This court could do no better than the second trial judge who had to assess the evidence without the benefit of hearing and seeing the witnesses. There was no reason to disagree with the findings of the judge (see p 296B–E).

[Bahasa Malaysia summary

Dalam tahun 1973, si suami ('perayu') memfailkan suatu tindakan terhadap isterinya ('penentang') (yang telah pun meninggal dunia) yang meminta deklarasi bahawa si isteri memegang dua buah rumah ('harta tersebut') atas amanah untuknya dan supaya harta tersebut dipindahmilik kepada si suami. Perayu, yang merupakan seorang kerani peguam, mendakwa bahawa beliau telah membeli harta tersebut dengan wang sendiri tetapi telah mendaftarkannya atas nama isteri. Beliau telah mengemukakan suatu deklarasi ('P2') sebagai bukti bahawa harta tersebut telah dibeli olehnya dan bahawa dia berhak kepada pendapatan daripada harta tersebut, yang dikatakan telah dilaksanakan oleh isterinya. Si isteri menafikan bahawa dia telah melaksanakan P2 dan menuntut bahawa ia adalah suatu pemalsuan. P2 dikatakan telah dilaksanakan pada masa yang sama dengan suatu memorandum pindahmilik ('P1') berhubung dengan harta tersebut tetapi kedua-dua dokumen didapati mempunyai cetakan bertaip yang berbeza. Tindakan itu telah ditolak dalam tahun 1993. Atas rayuan, Mahkamah Agung (pada masa itu) mengarah agar kes itu dibicarakan semula di hadapan seorang hakim Mahkamah Tinggi yang lain. Melalui persetujuan, tiada keterangan lanjut dikemukakan di perbicaraan kedua, di mana hakim hanya mendengar hujah berdasarkan keterangan yang sama seperti dalam perbicaraan pertama. Hakim perbicaraan kedua mendapati bahawa sebahagian daripada tandatangan pada P2 telah ditambah dengan dakwat yang berlainan warnanya. Hakim perbicaraan kedua menolak tuntutan itu, dan mendapati bahawa besar kebarangkalian berdasarkan keterangan, si isteri, dengan bantuan ayahnya, telah membeli harta tersebut, dan bahawa jika pun beliau tersilap, terdapat keterangan yang mencukupi untuk memberi justifikasi kepada anggapan pendahuluan. Perayu membuat rayuan. Perayu membidas peninggalan hakim perbicaraan dalam membicarakan keterangan PW2, seorang kerani lain di pejabat

yang sama dengan perayu, yang memberi keterangan atas sumpah bahawa dia telah melihat penentang menandatangani P2. Isu utama adalah sama ada tandatangan pada P2 adalah tandatangan penentang.

Diputuskan, menolak rayuan:

(1) Oleh kerana penentang telah menuntut bahawa P2 merupakan suatu pemalsuan, segalanya bergantung pada beban pembuktian. Perayu harus membuktikan atas imbangan kebarangkalian bahawa tandatangan tersebut adalah tandatangan penentang. Penentang harus membuktikan melampaui semua keraguan munasabah bahawa perayu bersalah atas pemalsuan (lihat ms 295G).

(2) Keterangan bebas yang ada pada hakim perbicaraan kedua dan mahkamah ini adalah keterangan dokumentari. PW2 dan perayu kedua-duanya kerani dalam pejabat yang sama dan PW2 tidak boleh dikatakan seorang saksi bebas pada keseluruhannya. Atas pertimbangan keterangan, bukan sahaja dakwat berlainan warnanya walaupun kedua-dua dokumen telah dilaksanakan pada hari yang sama tetapi tulisan bertaip juga tidak sama. Saksi pakar boleh memberi keterangan pendapat tetapi mahkamah bebas untuk membuat kesimpulan sendiri. Jika pun P2 diterima berdasarkan nilai lahirnya, ia tidak membentuk suatu deklarasi amanah bahawa harta tersebut harus dimiliki secara benefisial oleh perayu. Beliau hanya berhak kepada penggunaan pendapatan daripada harta tersebut dan tidak lebih daripada itu. Mahkamah ini tidak dapat mengatasi hakim perbicaraan kedua yang terpaksa menilai keterangan tanpa mendengar dan melihat saksi-saksi. Tiada sebab untuk bercanggah dengan pendapat hakim tersebut (lihat ms 296B–E).

Notes

For cases on documentary evidence, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 668–789.

Appeal from: Civil Suit No 1128 of 1973 (High Court, Kuala Lumpur)

Idrus Ibrahim (*Iskandar Putra Ishak* with him) (*Kam Woon Wah*) for the appellant.

Yau Jiok Hua (*Eric Clement* with him) (*Siva Thurai Mariany & Co*) for the respondent.

Abdul Malek Ahmad JCA (delivering the judgment of the court): Another marriage gone sour had resulted in this appeal before us where the appellant is asking for a declaration of a resulting trust by his wife, the respondent, on two properties at No 4, Jalan Chempedak, Kuala Lumpur ('the first property') and on the one third share of No 48, Upper Kovil Road, Kuala Lumpur ('the second property'), that the respondent do effect the transfer

of these properties back to him, failing which the senior assistant registrar is to execute all the relevant documents. The respondent had since passed away and, in the absence of any objection from the appellant, is now represented by their two daughters in the action.

Unfortunately, we often discover only at the appellate level that trials at first instance take a considerably long time to be heard and disposed of and this is one such case. The action had been filed in 1973 but the hearing did not commence until 1984. To make things worse, the decision was only delivered in 1993, 20 years after the filing of the action and nine years after the commencement of the trial. Maybe it is appropriate for us to state at this juncture that we really hope that we would not come across such inordinate delays in the future.

The appellant's claim was dismissed and on appeal, the Supreme Court on 3 February 1994 directed that the case be retried before another High Court judge. The respondent had in the meantime passed away on 13 October 1995. By consent, the parties had agreed at the outset of the second trial that no further evidence need to be tendered except those used in the first trial. We were thus placed in the same position as the Supreme Court which heard the appeal as regards the first trial and which could have decided the matter without the need for a retrial if the decision was to depend solely on the notes of evidence of the first trial. The second hearing was just by way of hearing arguments and the resultant effect was that three tribunals have had to give judgment on the same evidence which is now before us.

The appellant's version was that he had purchased the first property and the second property and another property at No 40, Upper Kovil Road, Kuala Lumpur ('the third property') with his money but had registered them in the respondent's name on the grounds that: 'if I die first, she need not take out letters of administration but if she dies first, the whole property [properties] will come to me as husband in any event. It is not difficult for me to take out letters of administration as I am a lawyer's clerk'.

The appellant maintains that he bought the properties with his hard earned savings. To support his assertion, he had produced the following declaration ('P2') which was executed by the respondent and attested by two witnesses:

K Rasammah,
No 48, Upper Kovil Road,
Sentul,
Kuala Lumpur.
7 April 1961.

I, Rasammah, wife of Samuel Kulasingam alias Rasammah d/o JV Thambipillai of No 48, Upper Kovil Road, Sentul, Kuala Lumpur do hereby confirm that the following properties are purchased by my husband, Mr S Kulasingam of No 48, Upper Kovil Road, Sentul, Kuala Lumpur out of his own money although these properties are registered in my name:

1 One third (⅓) undivided share of the land held under Certificate of Title No10042 for Lot No 22 Section 79 Town of Kuala Lumpur with a brick building known as No 48, Upper Kovil Road, Sentul, Kuala Lumpur.

2 The land held under Certificate of Title No 17189 for Lot No 183 Section 79 Town of Kuala Lumpur with a brick building known as No 4, Jalan Chempedak, Sentul, Kuala Lumpur.

3 The land held under Certificate of Title No 10050 for Lot No 30 Section 79 Town of Kuala Lumpur with a building known as No 40, Upper Kovil Road, Sentul, Kuala Lumpur.

I further declare that I will not sell or transfer or charge the abovesaid properties without first obtaining the written consent from my husband. My husband is entitled to the income from the above properties.

Sgd
(K Rasammah)

Witness
Sgd (illegible)
Sgd (T Daniel Doraiappah)

To
Mr S Kulasingam

Before us, learned counsel for the appellant reiterated that although it is not specifically stated, that declaration suggests that the holding of the relevant properties by the respondent is on trust. As for the late stamping of the document, learned counsel had informed us that the appellant had said that he did not know that it needed stamping although he was a lawyer's clerk. It is pertinent to point out that the stamping was done on 31 October 1973, that is, in the same year the action was filed.

Before the first trial judge, the respondent had emphatically denied that she had executed P2 claiming that it was a forgery. In addition, she alleged that all the properties were purchased by her from her dowry or from the money given to her by her deceased father. She had even filed a counterclaim for the rentals and income collected by the appellant for the second property. She had also applied to evict the appellant who was residing on the said premises.

In any case, she had added in her statement of defence that if the appellant had paid for or contributed to the purchase or acquisition of the said properties, the appellant had made gifts of the said properties to her for love and affection.

What happened at the first trial was that both parties had explained how they had financially managed to acquire the properties. The appellant maintained that he had a high salary as a lawyer's clerk and, with his good sense of thrift, had accumulated his savings to pay for the said properties. The respondent, despite being a housewife, had obtained the properties through the dowry and financial support provided by her father. Of course, the appellant insisted that the respondent's version cannot be correct as the respondent's father was only a retired hospital dresser. The trial judge

A the second time around found to the contrary as he held that it was the respondent's father who was the original owner of the second property which upon his death had been divided equally between the respondent and her two brothers. Apart from that, he had other landed properties in Ceylon and Malacca.

B As for the first property, the appellant reiterated that it could not have been purchased with money from the respondent's father since no entry had been made to that effect in the diary produced by the respondent to show that her father had assisted her financially. In our considered opinion, the absence of detail of the purchase of the first property in the respondent's father's diary could not amount to demolishing the C respondent's evidence as a whole on this point.

As for the appellant's assertions that the respondent could not have utilized RM3,500 from the OCBC Bank loan to pay for the one third share purchase of the second property as the total loan amount of RM20,000 had already been drawn down two weeks before the vendor of the property D executed the memorandum of transfer, they were not accepted by the second trial judge as the earlier withdrawals could also have been for the purpose of paying the vendor.

The appellant had also questioned the discrepancies of the respondent's evidence in the first trial with her testimony in the magistrate's E court at the hearing of her maintenance claim against him. On this point, the second trial judge had accepted the respondent's explanation that this was due to her non-preparation on the detailed questioning of money matters at the maintenance hearing which took her by surprise. For the instant case, she was more prepared and had the relevant details ready which she disclosed with clarity despite the severe and persistent cross F examination by learned counsel for the appellant.

As for the appellant, he was working as a junior lawyer's clerk in Batu Pahat after the war earning RM275 which was increased to RM300 per month plus bonuses when he worked in Klang. The second trial judge found this fact a gross exaggeration for junior lawyer's clerks in that period G of time could never command that sort of salary or bonus.

The appellant also maintained that he had sold a piece of property in Ceylon before coming to this country implying that he had come here with a large amount of money. This piece of evidence was also rejected by the second trial judge considering the first and third properties were purchased H close to one another in point of time, his job and salary, and his family commitments.

Consequently, in view of all these factors, the learned second trial judge found it more probable that the respondent, with the assistance of her father, had purchased the properties.

I The second trial judge had also evaluated the evidence pertaining to P1 and P2. As for the latter, it was purportedly executed on 7 April 1961 in the legal firm where the appellant worked as chief clerk. It was drawn up by the appellant and executed at the same time as P1, which was a memorandum of transfer where the one third share of the second property

was sold to the respondent. Since the respondent had denied executing P2, it was sent to the Chemistry Department for analysis. The handwriting expert's report was that it could not be ascertained whether the signature therein was actually that of the respondent.

The second trial judge had himself examined the original exhibits and found that a tail to the initial 'K' had been added with a different coloured ink. To this, the respondent had explained in the first trial that prior to 1960, she had signed that particular initial with a tail but had subsequently dropped it. The second trial judge concluded that some one else must have added the tail to it since the relevant exhibit was not in the possession of the respondent but of the appellant. In addition, the office boy who testified categorically stated that only one pen had been used.

The appellant had alleged that the document could have been tampered when the court sent it to the Chemistry Department but this was not accepted by the second trial judge as he doubted that parties not related to the matter would have done so. Further, the second trial judge felt that the person who added the tail to the initial must have known of the existence of such a stroke which had been 'forgotten' by the respondent. Neither the officials of the court or the Chemistry Department, he added, could have known of the missing tail.

The appellant had also insisted that P2 was signed at the solicitor's office at the same time as P1. According to the respondent, it was executed by her in her house when the appellant brought it home. A careful scrutiny of P1 shows that it was not signed before a solicitor who had attested it solely relying on the information and knowledge of the appellant that the signatures were that of the respondent and the vendor. If the evidence indicated that the respondent had met the solicitor just before signing P2, then P1 should have been signed before the solicitor who did not have to rely on information from the appellant as regards the signatures as the respondent was physically present before him. The second trial judge found that if P1 was not signed in the solicitor's office, the probability was that P2 was also not executed there.

P2 had also been drawn up three years after the purchase of the first property and ten years after the third property was bought. If the appellant had intended to have a declaration of a resulting trust, it would have been done immediately after each purchase. P2 came into the picture after the writ in the instant case was filed and stamped 12 years after the event. The appellant's position as a lawyer's clerk only adds doubts to the authenticity of the relevant documents in view of the background facts.

In the concluding paragraphs of his judgment, the learned second trial judge had said:

> Even if this court has erred in the aforesaid findings, this court is of the opinion that based on the circumstances of this case, there is sufficient evidence to justify the presumption of advancement.
>
> This principle of advancement, as it is called, applies to all cases in which the person providing the purchase money is under an equitable obligation to support, or make provision for, the person to whom the property is conveyed

A (eg) where the former is the husband or father of, or stands in loco parentis to, the latter ... . Accordingly, if a man buys property and has it conveyed to his wife ... prima facie this is a gift for her. However under modern conditions, with the reduction in the wife's economic dependence on her husband, the force of the presumption is much weakened.' — Lord Brightman in the Privy Council case of *Neo Tai Kim v Foo Stie Wah* [1985] 1 MLJ 397. However, in B the circumstances of this case before this court, this presumption is not weakened by the fact that the defendant following the Ceylonese Tamil tradition was totally dependent on her husband (if this court has erred in the finding that the defendant was provided with financial assistance by her father to purchase the said properties).

Being a presumption, it can be rebutted but 'he must prove the trust C clearly and distinctly by evidence properly admissible for the purpose ...' — Lord Denning in *Palaniappa Chettiar v Arunasalam Chettiar* [1962] MLJ 143. Further, accepting the principle of Rajah J in the Singapore case of *Neo Tai Kim v Foo Stie Wah* [1982] 1 MLJ 170, this court is of the view that the husband's rebuttal of this presumption must show that at the time of the transaction of the purchase there was, as between him and his wife, a D common intention that it would be on trust for him, and this common intention may be proved by acts or declarations of the parties before, or at or immediately after the time of the purchase.

From the facts of this case, this court finds no clear and distinct acts expressly or by implication from both parties that the purchases were meant for a resulting trust. There is no documentary evidence of declaration for E such a trust, now that this court has ruled out that P2 was executed by the defendant. Again there are no evidence of any common intention of such a trust either made before, or at, or immediately after the purchases; taking into consideration that the said properties were purchased many years before this claim was made.

F He had accordingly dismissed the appellant's claim with costs and allowed the respondent's counterclaim with costs.

Since the second trial judge did not have the opportunity of seeing and hearing the witnesses, we were in as good a position as he was in addressing ourselves to the points raised by learned counsel for the appellant.

G The main issue was whether the signature on P2 was that of the respondent. Since she claimed it was a forgery, everything turned on the onus of proof. The appellant had to show on the balance of probabilities that the signature was that of the respondent. The respondent had to show beyond all reasonable doubt that the appellant was guilty of forgery.

H The second trial judge had held that the respondent could not have signed P1 in the presence of the attesting solicitor. We had considered this point and agree with the second trial judge's reasoning because if the respondent had signed P2 in the solicitor's office, she would have done so in the presence of the solicitor and there would be no need for two attesting witnesses to confirm to the solicitor that the signature was that of I the respondent.

The strength of the appellant's attack rests on the omission of the second trial judge to deal with the evidence of PW2 who gave sworn evidence that he had seen the respondent sign P2 and it was not put to him

in cross-examination in so many words that the respondent could not have signed P2 in his presence because the signature was a forgery and she had not signed it at all. The respondent's case was put to the appellant and the line of cross-examination taken with PW2 suggests that it was not accepted that she had signed it. PW2 and the appellant were both clerks in the same office and PW2 cannot be said to be a totally independent witness.

The independent evidence is constituted by the documents themselves. Not only is the ink different in colour even though both documents were executed on the same day but the typewriting is also not the same. Expert witnesses only give opinion evidence but the court is free to draw its own conclusions. Even if the relevant document P2 is accepted at face value, it does not constitute a declaration of trust that the properties are to belong beneficially to the appellant. He was only to have the use of the income and nothing else.

We could do no better than the second trial judge who was put in the same position as we in the appellate tribunal were as he had to assess the evidence without the benefit of hearing and seeing the witnesses. We had dutifully deliberated on the issues raised and the conclusions of the learned second trial judge. We find no reason to disagree with the decision arrived at and had accordingly dismissed the appeal with costs. We had also ordered that the deposit is to go to the respondent to account of their taxed costs.

Appeal dismissed.

Reported by Koay Sook Kuan